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No. 95-508

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROBERT W. KEARNS,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION; AMERICAN MOTORS CORPORATION; KLH, PROFESSIONAL CORPORATION; REED SMITH SHAW & McCLAY; ARNOLD, WHITE & DURKEE, CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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RESPONDENT REED SMITH SHAW & McCLAY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent Reed Smith rejects the questions presented for review in the Petition for Writ of Certiorari because they raise issues that have already been decided and are thus barred by *res judicata* or that are untimely or unsuitable to be decided by this honorable Court.*

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* Reed Smith believes that the procedural history itself is a sufficient basis upon which the Court may decide this Petition for Writ of Certiorari. However, Reed Smith will promptly submit any additional briefing in opposition that the Court finds necessary.

PARTIES

Respondent Reed Smith Shaw & McClay ("Reed Smith") is a Pennsylvania partnership with approximately 360 attorneys and offices in seven cities. Reed Smith was counsel to Petitioner in the liability portion of a patent infringement action brought by him against the Chrysler Corporation in the Eastern District of Michigan before the Honorable Judge Avern Cohn. Thereafter, Reed Smith engaged in ancillary litigation with Petitioner to recover attorneys' fees and expenses associated with its representation of Petitioner in the Chrysler action.

Petitioner Dr. Robert W. Kearns ("Dr. Kearns") is an inventor who held several patents related to intermittent windshield wiper control systems. These patents have been the underlying subject of patent infringement litigation and lengthy associated proceedings brought by Dr. Kearns against several automobile manufacturers, including the Chrysler action in which Reed Smith represented him. Dr. Kearns has also fought efforts by Reed Smith and others, including Arnold, White and Durkee ("AW&D"), to collect fees and expenses associated with these lawsuits. Dr. Kearns is currently proceeding *pro se*.

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STATEMENT OF THE CASE

Dr. Kearns has cited a number of "questions" for review in his Petition for Writ of Certiorari. Respondent submits, however, that Dr. Kearns' latest petition does not present any issues which can be resolved by this Court at the current procedural stage of the litigation. A review of this procedural history demonstrates that this Petition for Writ of Certiorari should be denied.

1. Dr. Kearns' Patent Infringement Action Against Chrysler

Dr. Kearns filed a patent infringement action against Chrysler in the Eastern District of Michigan (*Robert W.*

Kearns v. Chrysler Corporation, et al., No. 82-70748, E.D. Mich.) which resulted in a jury verdict in his favor and Final Judgment entered by U.S. District Judge Avern Cohn on October 26, 1992 against Chrysler in the amount of $18,740,465.43. Pet. App. A-1. Chrysler appealed and Dr. Kearns filed a cross-appeal to the Court of Appeals for the Federal Circuit. On August 11, 1994, the Federal Circuit affirmed the Final Judgment and rejected Dr. Kearns' cross-appeal. (*Robert W. Kearns v. Chrysler Corporation*, 32 F.3d 1541 (Fed. Cir. 1994)). This Court denied Chrysler's Petition for Writ of Certiorari on March 20, 1995. *Chrysler Corporation v. Kearns*, 115 S. Ct. 1392 (1995). Dr. Kearns also filed a petition for certiorari which this Court denied on March 20, 1995. *Kearns v. Chrysler*, 115 S. Ct. 1393 (1995).

2. Attorneys' Fees Litigation Against Dr. Kearns

Reed Smith served as counsel to Dr. Kearns through the completion of the liability phase of his patent infringement trial against Chrysler in the Eastern District of Michigan. With the consent of the court, Reed Smith withdrew from that case after the jury had entered findings of liability against Chrysler. Arnold White & Durkee ("AW&D") had been counsel to Dr. Kearns in the Chrysler action prior to the time that Dr. Kearns dismissed them and replaced them with Reed Smith. After the Chrysler verdict, both AW&D and Reed Smith filed separate claims against Dr. Kearns to recover attorneys' fees and expenses incidental to their respective representations.

At Judge Cohn's direction, Reed Smith filed an application for recovery of attorneys' fees, expenses, interest and a performance bonus with the court in the Eastern District of Michigan on September 23, 1993. After a hearing before a magistrate on Reed Smith's and AW&D's applications, Judge Cohn entered an order dated August 26, 1994 that awarded attorneys' fees and expenses in specified amounts to the law firms. ("Final Fee Or-

der") Resp. App. 1a. The district court denied Dr. Kearns' motion for reconsideration of the Final Fee Order on September 14, 1994.

Dr. Kearns appealed the Final Fee Order to the Court of Appeals for the Federal Circuit. On February 15, 1995, pursuant to motions to dismiss filed by Reed Smith and AW&D, the court of appeals dismissed Dr. Kearns' appeal because it was untimely filed. Pet. App. A-9.

3. Chrysler's Interpleader Action

Following the denial by this Court on March 20, 1995 of the Petitions for Writ of Certiorari in the underlying *Chrysler* case, Chrysler filed an interpleader action with the court in the Eastern District of Michigan seeking, *inter alia*, directions on the distribution of the money judgment awarded to Dr. Kearns. On April 3, 1995, the district court entered an Order directing Chrysler to deposit the money judgment with the court ("Order Directing Payment"). Pet. App. A-3.

On April 12, 1995, after a hearing at which Dr. Kearns and other interested parties were permitted to express their views on the distribution of the Final Judgment, Judge Cohn signed an Order for Distribution of Funds Deposited in Court ("Order for Distribution"). This Order called for immediate payment to Dr. Kearns of his portion of the judgment and for distribution of the remainder of the judgment to the other interested parties, including Reed Smith and AW&D, on May 3, 1995. Resp. App. 4a.

On April 27, 1995, Judge Cohn denied two motions for reconsideration and a motion to stay which Dr. Kearns filed in connection with the court's Order Directing Payment and Order for Distribution ("the Distribution Orders").

Dr. Kearns then appealed the Distribution Orders to the Court of Appeals for the Federal Circuit. On June

28, 1995, pursuant to motions of Reed Smith and AW&D, the Federal Circuit dismissed those appeals. Pet. App. A-13. Thereafter, Dr. Kearns filed with the Federal Circuit a series of submissions in the nature of motions for reconsideration. On September 19, 1995, the Court of Appeals for the Federal Circuit denied those motions. Pet. App. A-15. This Petition for Writ of Certiorari followed.

ARGUMENT

The various "questions" raised by Dr. Kearns' latest Petition for Writ of Certiorari relate to matters decided in all three of the procedural stages outlined in the previous section. First, Dr. Kearns' "questions" relate to the merits of his patent infringement action against the Chrysler Corporation. Second, they relate to the rulings of the district court regarding the attorneys' fees disputes between Dr. Kearns and the law firms which represented him in the *Chrysler* case. Finally, they relate to rulings of the district court regarding the interpleader action filed by Chrysler seeking direction for the distribution of the money judgment awarded to Dr. Kearns in the underlying patent infringement action.

With regard to the first set of issues, the merits of the patent infringement action against Chrysler were litigated extensively and finally disposed of with the issuance by this Court on March 20, 1995 of the orders denying Chrysler's and Dr. Kearns' Petitions for Writ of Certiorari. Therefore, any issues raised in Dr. Kearns' pending petition that directly relate to the merits of the patent infringement case of *Kearns v. Chrysler*, including the appropriate and available relief in such an action, are barred from further review by *res judicata*.

Second, issues which might pertain to the merits of the fee dispute are untimely for purposes of review under a Writ of Certiorari. The petition was not filed until September 26, 1995, long after the Federal Circuit dismissed the appeal pertaining to the merits of the fee dis-

pute on February 15, 1995. Therefore, any issues relating to the lower court's disposition of attorneys' fees disputes, including entitlement to the fees and their amounts, are untimely and should not be considered by this Court.

The only issues raised in the pending Petition for Writ of Certiorari which are even arguably timely are those which relate to the lower court's Distribution Orders arising from Chrysler's interpleader action. However, such orders were nothing more than executions of the Final Judgment and Final Fee Order which Dr. Kearns had already appealed and lost. The Distribution Orders did not depart in any way from the Final Judgment or the Final Fee Order. They were simply procedural orders by which Judge Cohn facilitated the distribution of the Final Judgment to Reed Smith and the other interested parties who had a claim on the judgment. The Distribution Orders did not present any questions independent of those which had already been decided on the merits. Therefore, they raise no serious questions warranting review by this Court.

CONCLUSION

For the reasons stated above, Reed Smith respectfully requests this honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 82-70748

ROBERT W. KEARNS,
Plaintiff,

v.

CHRYSLER CORPORATION,
Defendant.

ORDER ON APPLICATIONS FOR ATTORNEY FEES

On February 10, 1994 a magistrate judge filed a report and recommendation relating to the attorney fee claim of Arnold, White and Durkee Corporation (AWD) in this patent case. On July 19, 1994, the magistrate judge filed a second report and recommendation relating to the attorney fee claim of AWD and the attorney fee claim of Reed, Smith, Shaw and McClay (RSSM). Both reports recommend that AWD and RSSM receive attorney fees for plaintiff's successes at trial for reasons and in amounts described by the magistrate judge. AWD has filed objections asserting (1) its right to a proportional share of the prejudgment interest part of the judgment in favor of plaintiff; (2) that an award of expenses to Kearns should be excluded from the amount of attorney fees to which it is entitled; and (3) that it should not be charged for a credit to defendant for plaintiff's sanctioned conduct. Plaintiff has filed a paper styled Plaintiff Kearns' Objection To Magistrate Morgan's Report And Recommenda-

tion. The paper does not conform to the rules for objections and review as described in the closing paragraphs of the reports and recommendations and, therefore, will not be considered by the Court.

Accordingly, there being no proper response to the objections of AWD and no objections to the reports and recommendations except as noted, the findings and conclusions of the Reports And Recommendations filed February 10, 1994 and July 19, 1994 are adopted by the Court as its findings and conclusions except that AWD shall (1) be entitled to a proportional share of the prejudgment interest awarded plaintiff; (2) not receive a proportional amount of the expenses awarded plaintiff; and (3) not be charged a proportional share of the credit to defendant for plaintiff's sanctioned conduct.

The amounts of the fees awarded are described in Exhibit A.

Payment to AWD is subject to payment of the judgment by defendant.

SO ORDERED.

/s/ Avern Cohn
AVERN COHN
United States District Judge

DATED: Aug. 26, 1994
Detroit, Michigan

EXHIBIT A

A. Arnold, White and Durkee—$6,460,629.76 plus post-judgment interest thereon from June 11, 1992.

B. Reed, Smith, Shaw and McClay—$970,055.11 plus interest at 6% from January 7, 1992, together with a performance bonus of $565,000 plus interest at 6% from January 7, 1992. Payment of the performance bonus is subject to payment of the judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Hon. Avern Cohn
Civil No. 82-70748

ROBERT W. KEARNS,
Plaintiff,

vs.

CHRYSLER CORPORATION,
and
Defendant;

ARNOLD WHITE & DURKEE CORPORATION;
REED SMITH SHAW & MCCLAY,
Movants.

ORDER FOR DISTRUBITION OF FUNDS
DEPOSITED IN COURT

After hearing regarding disbursements of the funds deposited in Court by Chrysler Corporation on April 4, 1995, in the amount of $21,077,300.82, in satisfaction of the Final Judgment against Chrlysler Corporation entered October 24, 1992;

IT IS ORDERED that the Clerk of this Court shall immediately disburse to ROBERT W. KEARNS, SSN: 370-22-8932, 2350 Bering Drive, #124, Houston, Texas 77057, or such other address as Kearns should designate, the amount of $10,400,000.00, together with interest earned on that amount since deposit, reduced by 10% for authorized fees. The interest earned shall be calculated by multiplying the total amount of interest earned in the account by the percentage equal to $10,400,000.00 divided by $21,077,300.82.

IT IS FURTHER ORDERED that on May 3, 1995, the Clerk shall disburse the remainder of the account as follows:

1. $1,040,000.00, together with interest earned on that amount since deposit reduced by ten (10%) percent for authorized fees, shall be delivered via check by the Clerk, payable to Phyllis J. Kearns, 18505 Grouse Lane, Gathersburg, Maryland 20879.

2. $103,188.78, together with interest earned on that amount since deposit reduced by ten (10%) percent for authorized fees, shall be delivered via check by the Clerk, payable to Vincent L. Barker, Jr., SSN: 376-32-7636, 1130 Edison Plaza, Toledo, Ohio 43604.

3. $156,047.39, together with interest at the rate of $48.16 per day since April 12, 1995, until paid, shall be delivered via check by the Clerk, payable to KLH, P.C., FEIN: 38-2478614, 24561 North River Road, Mt. Clemens, Michigan 48043.

4. $1,853,219.90, together with interest earned on that amount since deposit reduced by ten (10%) percent for authorized fees, shall be delivered via check by the Clerk, payable to Reed, Smith, Shaw & McClay, FEIN: 25-0749630, 1200 18th Street N.W., Washington, D.C. 20036.

5. $7,266,236.37, together with interest earned on that amount since deposit reduced by ten (10%) percent for authorized fees, shall be delivered via check by the Clerk, payable to Arnold, White & Durkee, FEIN 74-1658804, 750 Bering Drive, Houston, Texas 77057.

IT IS FURTHER ORDERED that the interest applicable to the disbursements identified in Items 1, 2, 4 and 5 above, shall be calculated by multiplying the total interest earned and remaining in the fund by a percentage equal to the principal amount specified, divided by $10,677,300.82. The remaining value of the fund, after the above disbursements and after deducting any author-

ized fees, shall be divided, and ninety (90%) percent shall be disbursed by check payable to ROBERT W. KEARNS, SSN: 370-22-8932, 2350 Bering Drive, #124, Houston, Texas 77057, or such other address as Kearns should designate and ten (10%) percent of the remaining value shall be disbursed by check payable to Phyllis J. Kearns, 18505 Grouse Lane, Gathersburg, Maryland 20879.

/s/ Avern Cohn
U.S. District Judge